



The following constitutes the  
Memorandum Decision of the Court.  
Signed October 15, 2012

  
Roger L. Efremsky  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

In re FRANCES RENEE NORTH,

Case No. 11-72843

Chapter 13

Debtor.

**MEMORANDUM DECISION RE TRUSTEE'S OBJECTION  
TO CONFIRMATION OF CHAPTER 13 PLAN**

**A. Introduction**

Frances Renee North ("North") filed this chapter 13 case on December 8, 2011. This case was filed approximately two and one-half years after North received a discharge in a prior chapter 7

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1 case.<sup>1</sup> She is not entitled to a discharge in this case.  
2 Bankruptcy Code § 1328(f).<sup>2</sup> North's plan proposes to strip a lien  
3 on her principal residence. The trustee objects to confirmation  
4 on the grounds that North's plan can not be confirmed because  
5 North cannot strip this lien without a discharge.

6 For the reasons explained below, the court overrules the  
7 trustee's objection.  
8

## 9 **B. Jurisdiction**

10 This court has subject matter jurisdiction of this  
11 proceeding pursuant to 28 U.S.C. § 1334. This is a core  
12 proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (K), (L), (O).  
13

## 14 **C. Background**

### 15 **1. North's Schedules**

16 On schedule A, North lists her principal residence with a  
17 value of \$614,600. Docket no. 1. On schedule D, she states that  
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19 <sup>1</sup> See case no. 08-45500 filed by debtor pro se on September  
20 29, 2008 as a chapter 13 case, converted to chapter 7 by debtor  
21 on February 9, 2009, and discharge order entered on May 21, 2009.  
22 Her schedules listed assets of \$730,603 and liabilities of  
23 \$913,791 of which \$859,000 was secured, and \$54,791 was unsecured  
24 non-priority. The court notes these additional cases listed on  
debtor's current petition: 11-42239, 11-48117, 11-71439, all of  
which were filed by debtor pro se and all of which were dismissed  
for failure to complete required filings.

25 <sup>2</sup> Unless specified otherwise, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
27 Bankruptcy Rule references are to the Federal Rules of Bankruptcy  
28 Procedure, Rules 1001-9037, and all Civil Rule references are to  
the Federal Rules of Civil Procedure.

1 Wachovia Mortgage holds the first priority lien on her residence  
2 securing a debt of \$748,433, and CLC Consumer Services ("CLC")  
3 holds a second priority lien securing a debt of \$39,439. Docket  
4 no. 1. Schedule F lists no unsecured debt. Her schedule I  
5 indicates monthly income of \$5,082, from social security and from  
6 "income from real property." Her schedule J indicates monthly net  
7 income of \$1,179.02.

## 8 **2. North's Chapter 13 Plan and the Confirmation Process**

9 North's chapter 13 plan calls for payments of \$1,182.93 per  
10 month for 60 months and payment to unsecured creditors on a pro  
11 tanto basis. The plan also states that she intends to file a  
12 motion to avoid the CLC lien because CLC is wholly unsecured.  
13 Docket no. 2.

14 The trustee has objected to confirmation and requested  
15 dismissal of the case. Docket nos. 15, 20. The trustee argues  
16 that the plan is not feasible because North may not permanently  
17 strip CLC's lien because she is not eligible for a discharge. The  
18 trustee relies primarily on the reasoning of In re Victorio, 454  
19 B.R. 759 (Bankr. S.D. Cal. 2011), aff'd, 470 B.R. 545 (S.D. Cal.  
20 2012). The debtor has not briefed this issue.

21 The meeting of creditors was held and concluded on January  
22 19, 2012. The trustee gave notice to all creditors that a  
23 confirmation hearing would be held on March 20, 2012 and the  
24 confirmation hearing was thereafter continued to June 19, 2012 at  
25 which point the matter was taken under submission.

## 26 **3. North's Motion to Avoid Lien**

27 North filed a motion to avoid the CLC lien on January 18,  
28 2012. Docket nos. 16, 17. CLC was properly served with this

1 motion and has not responded to it. North requested and obtained  
2 a default order on February 12, 2012. However, the court vacated  
3 it in light of the trustee's pending objection. Docket nos. 22,  
4 23.

#### 5 6 **D. Discussion**

7 The trustee's objection raises one essential issue: may the  
8 CLC lien be permanently stripped when the debtor is not entitled  
9 to a discharge.

10 The arguments for and against permitting lien stripping in  
11 this chapter 20 context are well established. The competing views  
12 are explained in In re Victorio, 454 B.R. 759; In re Gerardin,  
13 447 B.R. 342 (Bankr. S.D. Fla. 2011) (against allowing it) and In  
14 re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010), In re Hill, 440  
15 B.R. 176 (Bankr. S.D. Cal. 2010), In re Okosisi, 451 B.R. 90  
16 (Bankr. D. Nev. 2011), In re Scantling, 465 B.R. 671 (Bankr. M.D.  
17 Fla. 2012), In re Fisette, 455 B.R. 177 (8th Cir. BAP 2011) (in  
18 favor of allowing it). This court now joins the latter group of  
19 cases and endorses the reasoning of these cases.

##### 20 **1. CLC Does Not Have an Allowed Secured Claim**

21 To participate in a chapter 13 case, a creditor must have a  
22 "claim" as defined in § 101(5) of the Bankruptcy Code. A claim is  
23 either deemed "allowed" under § 502(a), or "disallowed" according  
24 to § 502(b). An allowed claim is paid according to the terms of  
25 the chapter 13 plan and a disallowed claim is not so paid.

26 In the most general sense, a claim is "secured" if a  
27 creditor holds a security interest in, or lien on, collateral  
28

1 owned by a debtor. See § 101(37). Section 506(a)<sup>3</sup> bifurcates such  
2 a claim into secured and unsecured pieces based on the value of  
3 the collateral, and such a claim is classified for plan purposes  
4 accordingly.

5 Again, in the most general sense, lien rights survive  
6 bankruptcy. Long v. Bullard, 117 U.S. 617, 620-21 (1886).  
7 Although § 506(d) provides that to the extent that a lien secures  
8 a claim against the debtor that is not an allowed secured claim,  
9 Dewsnup v. Timm, 502 U.S. 410, 417 (1992), holds that a chapter 7  
10 debtor may not avoid a lien based on the value of the collateral  
11 and the amount of senior liens. Nonetheless, lien avoidance is  
12 broadly permitted in reorganization chapters and a chapter 13  
13 debtor may do what a chapter 7 debtor may not. In re Enewally,  
14 368 F.3d 1165, 1169-70 (9th Cir. 2004); In re Barte, 212 F.3d  
15 277, 291, n. 21 (5th Cir. 2000).

16 Johnson v. Home State Bank, 501 U.S. 78 (1991), holds that a  
17 discharge in a chapter 7 case extinguishes the chapter 7 debtor's  
18 personal liability for a secured debt, but because the discharge  
19 does not extinguish liens, it does not extinguish such a  
20 creditor's *in rem* rights. When that debtor files a subsequent  
21 chapter 13 case, these *in rem* rights constitute a claim under the  
22 definition in § 101(5) that may be restructured in that debtor's  
23 chapter 13 plan.

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25 <sup>3</sup> According to § 506(a), "An allowed claim of a creditor  
26 secured by a lien on property in which the estate has an  
27 interest,... is a secured claim to the extent of the value of  
28 such creditor's interest in the estate's interest in such  
property,... and is an unsecured claim to the extent that the  
value of such creditor's interest is less than the amount of such  
allowed claim."

1       Section 1322(b)(2) provides that a chapter 13 plan may  
2 "modify the rights of holders of secured claims, other than a  
3 claim secured only by a security interest in real property that  
4 is the debtor's principal residence." Nobelman v. American  
5 Savings Bank, 508 U.S. 324, 328 (1993) discusses the interplay of  
6 § 506(a) and § 1322(b)(2). In Nobelman, the Supreme Court  
7 reasoned that the debtor was correct in looking to § 506(a) for a  
8 judicial valuation of a creditor's collateral to determine the  
9 status of that creditor's secured claim. However, when this  
10 valuation shows that the creditor is partially secured, it is  
11 still the "holder of a secured claim" and it has the right to the  
12 protection against modification of its secured claim provided in  
13 § 1322(b)(2). Id. at 328.

14       In In re Zimmer, 313 F.3d 1220 (9th Cir. 2002), the Ninth  
15 Circuit answered the question left after Nobelman. Zimmer holds  
16 that the protection against modification in § 1322(b)(2) does not  
17 extend to a creditor with a lien on the debtor's principal  
18 residence when its lien does not attach to any value. By  
19 operation of § 506(a), this creditor is not the "holder of a  
20 secured claim." Thus, "[t]he district court erred in holding that  
21 a wholly unsecured lien may not be avoided in a Chapter 13  
22 proceeding." Id. at 1222.

23       As summarized in In re Scantling, 465 B.R. 671 (Bankr. M.D.  
24 Fla. 2012):

25       There is a difference between the term of art "secured  
26 claim," on the one hand, and the notion that a creditor has  
27 a security interest or lien outside of bankruptcy, on the  
28 other hand. Having a security interest or lien outside of  
bankruptcy is translated under bankruptcy laws as having the  
"rights" of a secured creditor, not necessarily as being the  
holder of a secured claim. Once a determination has been

1 made under § 506 that the remaining *in rem* claim is wholly  
2 unsecured and that the creditor holds no secured claim in  
3 the bankruptcy case, the creditor is left with its  
nonbankruptcy rights. The debtor may then modify those  
"rights" under § 1322(b)(2).

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5 In re Scantling, 465 B.R. at 680.

6 Based on all of the foregoing authority and the undisputed  
7 factual record here, the court concludes that CLC is not the  
8 holder of an "allowed secured claim" and § 1322(b)(2) permits  
9 North to modify CLC's rights in her chapter 13 plan as she has  
10 proposed.

## 11 **2. Lien Stripping is Not Dependent on Receipt of a Discharge**

12 The trustee's objection is based on § 1325(a)(5).<sup>4</sup> Section  
13 1325(a)(5) presents a holder of an allowed secured claim with  
14 three choices regarding its treatment under a proposed chapter 13  
15 plan: (1) it may accept the plan's proposed treatment under  
16 § 1325(a)(5)(A); (2) it may accept the surrender of its  
17 collateral under § 1325(a)(5)(C); or (3) by timely filing an

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19 <sup>4</sup> Section 1325(a)(5) provides: "with respect to each allowed  
secured claim provided for by the plan--

20 (A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that--

21 (I) the holder of such claim retain the lien securing such  
claim until the earlier of--

22 (aa) the payment of the underlying debt determined under  
nonbankruptcy law; or

23 (bb) discharge under section 1328; and

24 (II) if the case under this chapter is dismissed or converted  
without completion of the plan, such lien shall

25 also be retained by such holder to the extent recognized by  
applicable nonbankruptcy law; ...

26 (ii) the value, as of the effective date of the plan, of  
property to be distributed under the plan on account of such  
27 claim is not less than the allowed amount of such claim; or

28 (C) the debtor surrenders the property securing such claim to  
such holder[.]"

1 objection, a holder of an allowed secured claim may demand the  
2 treatment specified in § 1325(a)(5)(B).

3 **a. Section 1325(a)(5)(A) Permits Acceptance by Silence**

4 Assuming for the sake of argument that CLC is the holder of  
5 an allowed secured claim, on the facts of this case, it has  
6 accepted the proposed plan treatment by its silence. In re  
7 Andrews, 49 F.3d 1404 (9th Cir. 1995). When notice of the plan  
8 terms and the motion to value is proper - as they were in this  
9 case - silence is deemed acceptance. The plan clearly identified  
10 CLC as the creditor, it clearly identified the property affected  
11 and clearly stated that CLC would be treated as an unsecured  
12 creditor. The motion to value did the same. On this record, there  
13 are no concerns regarding compliance with due process.<sup>5</sup>

14 Despite the clear structure in § 1325(a)(5), the trustee  
15 asserts that acceptance in this context may not be accomplished  
16 by silence. Other than one unpublished bankruptcy court decision  
17 from the Central District of California,<sup>6</sup> the trustee offers no  
18 authority for the proposition that there is an "important  
19 property rights" exception to § 1325(a)(5)(A). In fact, there is  
20 no such exception in the Bankruptcy Code and this court declines  
21 the invitation to add one. The failure to object translates into  
22 acceptance of the plan by the secured creditor and the trustee

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24 <sup>5</sup> Due process requires notice reasonably calculated, under  
25 all the circumstances, to apprise interested parties of the  
26 pendency of the action and afford them an opportunity to present  
27 their objections. Mullane v. Central Hanover Bank & Trust Co.,  
28 339 U.S. 306, 314 (1950).

<sup>6</sup> In re Winitzky, 2009 Bankr. LEXIS 2430 (C.D. Cal. May 7,  
2009).



1 may not thwart the effect of acceptance.

2 **b. Section 1322(b)(2) Permits Modification of State Law**  
3 **Lien Rights Without a Discharge**

4 As explained above, § 1325(a)(5) does not apply where the  
5 debtor is modifying the state law lien rights of a creditor that  
6 does not hold an allowed secured claim.

7 Nonetheless, the trustee's argument focuses on the language  
8 of § 1325(a)(5)(B)(i)(I) (requiring that the plan provide for the  
9 holder of an allowed secured claim to retain its lien until the  
10 earlier of the payment of the underlying debt or discharge under  
11 § 1328), and (II) (providing for retention of a lien if a case is  
12 dismissed or converted without plan completion). The cases  
13 supporting this argument contend that this section, in  
14 conjunction with § 506(d), make permanent lien avoidance depend  
15 on discharge. In re Victorio, 454 B.R. 759.<sup>7</sup> These cases reason  
16 that if Congress had intended to allow lien stripping to be  
17 permanent on completion of a chapter 13 plan, it would have made  
18 that clear in § 1325.

19 For the reasons explained in In re Tran, 431 B.R. 230; In re  
20 Hill, 440 B.R. 176; In re Okosisi, 451 B.R. 90; and In re  
21 Scantling, 465 B.R. 671, this court finds this Congressional  
22 intent argument and the decisions making permanent lien stripping  
23 depend on discharge unpersuasive.

24 This court agrees that nothing in § 1325 conditions plan

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26 <sup>7</sup> Among the many cases reaching this conclusion, see also In  
27 re Jarvis, 390 B.R. 600 (Bankr. C.D. Ill. 2008); In re Fenn, 428  
28 B.R. 494 (Bankr. N.D. Ill. 2010); In re Gerardin, 447 B.R. 342  
(Bankr. S.D. Fla. 2011); In re Quiros-Amy, 456 B.R. 140 (Bankr.  
S.D. Fla. 2011).

1 confirmation on eligibility for a discharge. Nothing in § 1322,  
2 § 506 or any other section of the Bankruptcy Code provides that a  
3 chapter 13 debtor's right to strip off liens is conditioned on  
4 eligibility for a discharge. In re Tran, 431 B.R. 230, 235.

5 Section 350(a)<sup>8</sup> and Rule 5009<sup>9</sup> contemplate closing a case  
6 once an estate has been fully administered. The fact that  
7 § 349(b)(1)(C)<sup>10</sup> provides for reinstatement of an avoided lien  
8 upon dismissal does not lead to a conclusion that chapter 20 lien  
9 stripping is precluded. The fact that § 348(f)(1)(C)<sup>11</sup> provides  
10 for secured claims to continue to be secured following conversion  
11 of a chapter 13 case to chapter 7 offers no support either. The  
12 court sees no restriction on closing a case without a discharge  
13 upon plan completion.

14 The cases which prohibit lien stripping in this context also  
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16 <sup>8</sup> According to § 350(a) after an estate is fully  
17 administered and the court has discharged the trustee, "the court  
18 shall close the case."

19 <sup>9</sup> Rule 5009(a) provides a presumption that an estate has  
20 been fully administered upon the occurrence of certain events and  
21 Rule 5009(b) provides that a chapter 13 case may be closed  
22 without entry of a discharge when the statement required by Rule  
23 1007(b)(7) (regarding the financial management course) is not  
24 timely filed. Nothing suggests that this provision excludes other  
25 reasons to close a case without a discharge.

26 <sup>10</sup> Section 349(b) provides that unless the court, for cause,  
27 orders otherwise, a dismissal of a case reinstates any lien  
28 voided under § 506(d).

29 <sup>11</sup> According to § 348(f)(1)(C), for cases converted from  
30 chapter 13, the claim of a creditor holding security as of the  
31 date of the filing continues to be secured unless the full amount  
32 of such claim has been paid in full as of the date of conversion,  
33 notwithstanding any valuation or determination of the amount of  
34 an allowed secured claim made for chapter 13 purposes.

1 find Congressional intent in the fact that § 1328(f)(1) precludes  
2 a chapter 13 debtor from receiving a discharge if the debtor  
3 received a discharge in a chapter 7 case filed within four years  
4 of the chapter 13 case. These courts see lien stripping as a "de  
5 facto discharge." In re Frazier, 469 B.R. 889, 895, n. 8 (E.D.  
6 Cal. 2012) (collecting cases).

7 As the Okosisi court did, this court "declines any  
8 invitation to guess Congress's intention when it passed BAPCPA.  
9 If Congress's goal was to limit the operation of sections  
10 1322(b)(2) and 1327 as well as discharge, it could have  
11 explicitly drafted the statute to achieve this goal. As it did  
12 not, the court will not read any further restrictions into the  
13 Bankruptcy Code." In re Okosisi, 451 B.R. 90, 100; In re  
14 Waterman, 469 B.R. 334, 340 (D. Colo. 2012) (if Congress had  
15 wanted to prohibit a chapter 20 debtor from stripping off a  
16 wholly unsecured lien on his principal residence, it could have  
17 easily done so; court will not read additional restrictions into  
18 statute.)<sup>12</sup>

19 Under § 1327(a), a confirmed plan is "binding on the debtor  
20 and each creditor whether or not the claim of such creditor is  
21 provided for by the plan, and whether or not such creditor has  
22 objected to, has accepted, or has rejected the plan." Sections  
23 1327(b) and (c) provide that "except as otherwise provided in the  
24 plan or the order confirming the plan, the confirmation of a plan  
25 vests all of the property of the estate in the debtor," and

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26  
27 <sup>12</sup> The court also notes that inability to obtain a discharge  
28 is not included in the list of factors to consider as cause to  
dismiss a chapter 13 case in § 1307(c).

1 except as otherwise provided, it vests "free and clear of any  
2 claim or interest of any creditor provided for by the plan."

3 This court agrees with Tran, Okosisi and Hill that the  
4 permanence of lien stripping in the chapter 20 context depends on  
5 completion of all plan payments. See In re Tran, 431 B.R. 230,  
6 235 (lien stripping permanent on performance and plan  
7 completion); In re Okosisi, 451 B.R. 90, 100 (successful  
8 completion of plan payments makes lien avoidance permanent); In  
9 re Hill, 440 B.R. 176, 182 (lien stripped under plan remains  
10 until plan is consummated).

### 11 3. Good Faith Issues

12 Good faith is always a consideration in the chapter 13  
13 confirmation context and the court has an independent duty to  
14 review a chapter 13 plan to ensure it complies with the  
15 Bankruptcy Code. United Student Aid Funds v. Espinosa, 130 S. Ct.  
16 1367 (2010). The court may not confirm a plan without a finding  
17 that the plan has been "proposed in good faith and not by any  
18 means forbidden by law." § 1325(a)(3). The court is guided here  
19 by In re Warren, 89 B.R. 87, 93-95 (9th Cir. BAP 1988) (court  
20 should not confirm plans that are in essence veiled chapter 7  
21 cases; listing good faith factors), and In re Goeb, 675 F.2d  
22 1386, 1390 (9th Cir. 1982) (court must inquire whether debtor has  
23 misrepresented facts in plan, unfairly manipulated the Bankruptcy  
24 Code, or otherwise proposed plan in an inequitable manner; though  
25 court may consider substantiality of proposed repayment, it must  
26 make good-faith determination in light of all militating  
27 factors.)

28 Here, North has a clear need for bankruptcy and nothing

1 indicates she is acting inequitably or unfairly. Her plan  
2 provides for payments of \$1,182.93 per month for 60 months and a  
3 pro tanto distribution to unsecured creditors. She is devoting  
4 her monthly disposable income to her plan payments. She will pay  
5 a mortgage arrearage of \$32,801 through her plan as well as  
6 secured debt to Capital One Auto Finance. (The court notes that  
7 only two claims have been filed - the Franchise Tax Board has  
8 filed a claim stating it is owed \$2,008 on an unsecured basis and  
9 \$7,212 on a priority basis and Capital One Auto Finance has filed  
10 an unsecured deficiency claim.)

11 On this record, the court finds no basis to question North's  
12 good faith or her need for reorganization under chapter 13.

#### 14 **E. Conclusion**

15 The lien stripping proposed by North's plan is permissible  
16 and it will be permanent upon completion of the plan. The  
17 trustee's objection to confirmation is overruled. However, the  
18 plan is not feasible until North obtains an order on the motion  
19 to avoid CLC's lien.

20 The court now requests North to resubmit her default order  
21 on the motion to avoid CLC's lien and requests the trustee to  
22 submit an order conforming to this memorandum decision following  
23 entry of an order on the motion to avoid CLC's lien.

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25 \* \* \* END OF MEMORANDUM DECISION \* \* \*  
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